Kopeks Holdings Sdn Bhd v Bank Islam Malaysia Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-02–1480 OF 2009
SULAIMAN DAUD, SYED AHMAD HELMY AND AZIAH ALI JJCA
21 FEBRUARY 2012

Contract — Formation — Whether contract had been concluded — Bank's letter of offer of Islamic banking facilities accepted by appellant — Appellant then requested bank to vary amount of facilities on two occasions — Whether appellant's acceptance absolute — Offer letter expressly required parties to execute security documents — No documents signed or drawdown made — Bank withdrew offer of facilities on discovering appellant financially unsound — Whether conditions precedent to formation of contract fulfilled

The appellant, an investment company, entered into agreements to purchase two pieces of land ('the land') to develop a housing project ('the project'). By a letter of offer ('the offer letter'), the respondent offered the appellant an *Al-Istisna'* Islamic financing facility to enable redemption of the land from the chargee, part-finance the first phase of the project and provide a bank/performance guarantee to cover development costs under the first phase. Two months later, the appellant requested for a variation to be made in the offer letter with regard to the land redemption amount and the amount stated for part-financing of the first phase. Ten months later, it requested the respondent to vary the development costs figure in the offer letter with respect to which the bank/performance guarantee was to be given. The respondent took time to deliberate on the variations the appellant had requested and to verify certain information it had received concerning the appellant's financial position. The parties had not executed any security documents in respect of the financing facility, nor had any drawdown been made. The respondent later informed the appellant that the offer for the financing facility had been withdrawn and cancelled. The appellant sued the respondent in the High Court claiming the withdrawal of the facility had caused it loss by making it unable to complete the purchase of the land and implement the project. The appellant claimed that as it had accepted the respondent's offer letter, a legally binding agreement had come into being which the respondent had breached. The respondent contended otherwise, saying there was non-fulfillment of various conditions precedent set out in the offer letter which included the execution of all formal security documents. The appellant's requests to revise the terms in the offer letter showed the parties were negotiating the terms of the contract and no legally binding agreement had come into being. The respondent also said it discovered that, contrary to the appellant's warranties and representations, the appellant was financially unsound with accumulated

massive losses and suspension of its Board which resulted in the respondent deciding to revoke the offer letter. The High Court found for the respondent. The appellant appealed the decision to the Court of Appeal.

Held, dismissing the appeal with costs:

(1) There was no concluded contract between the appellant and the respondent since the transaction between them had not been completed. Until the legal documents were executed, the letters of offer issued by the respondent remained expressions of willingness on the respondent's part to offer banking facilities to the appellant (see para 17).

(2) The respondent's offer was made subject to conditions stated in the letters of offer. It was within the contemplation of both parties that the execution of the *Al-Istisna*' purchase agreement and the *Al-Istisna*' sale agreement was a term of the bargain and not a mere formality. Those two agreements had to be executed to complete the financing transaction. It could not have been the intention of the parties that the conditions precedent could be disregarded (see para 17).

(3) Consistent with the requirements of the *Al-Istisna*' concept the respondent's offer letter provided for the purchase of the project by the respondent vide the *Al-Istisna*' purchase agreement and the sale by the appellant vide the *Al-Istisna*' sale agreement. Both agreements were essential to complete the financing transaction and were specified under the 'Documentation' clause of the offer letter as among the security documents that were required to be executed (see para 16).

(4) The appellant's acceptance of the respondent's offer letter was not absolute as pursuant to its acceptance, the appellant had requested for the amounts under the facility to be varied (see para 14).

[Bahasa Malaysia summary

Perayu, sebuah syarikat pelaburan, telah memasuki perjanjian-perjanjian untuk membeli dua bidang tanah ('tanah tersebut') untuk memajukan projek perumahan ('projek tersebut'). Melalui surat tawaran ('surat tawaran tersebut'), responden telah menawarkan perayu kemudahan pembiayaan secara Islam *Al-Istisna*' bagi memastikan penebusan tanah daripada pemegang gadaian, membiayai sebahagian daripada fasa pertama projek tersebut dan memberi jaminan bank/pelaksanaan bagi menampung kos pembangunan di bawah fasa pertama. Dua bulan kemudian, perayu telah meminta perubahan dibuat dalam surat tawaran tersebut berkaitan jumlah penebusan tanah tersebut dan jumlah tersebut dinyatakan untuk pembiayaan sebahagian daripada fasa pertama tersebut. Sepuluh bulan kemudian, ia telah meminta responden mengubah jumlah kos-kos pembangunan dalam surat tawaran tersebut berkaitan dengan jaminan bank/pelaksanaan yang diberikan. Responden mengambil masa untuk mempertimbangkan perubahan-perubahan yang

diminta perayu dan untuk mengesahkan maklumat tertentu yang telah diterimanya mengenai kedudukan kewangan perayu. Pihak-pihak tidak menyempurnakan apa-apa dokumen jaminan berhubung kemudahan kewangan, mahupun apa-apa susutan yang telah dibuat. Responden kemudian memberitahu perayu bahawa tawaran untuk kemudahan kewangan telah ditarik balik dan dibatalkan. Perayu mendakwa bahawa oleh kerana ia telah menerima surat tawaran responden, satu perjanjian sah yang mengikat telah terjalin yang mana responden telah melanggarinya. Responden menegaskan sebaliknya, dengan mengatakan terdapat ketidakpatuhan pelbagai prasyarat yang ditetapkan dalam surat tawaran termasuklah pelaksanaan semua dokumen rasmi jaminan. Permintaan perayu untuk mengubah terma-terma dalam surat tawaran tersebut menunjukkan pihak-pihak sedang berunding tentang terma-terma kontrak tersebut dan tiada perjanjian sah yang mengikat. Responden juga mengatakan ia mendapati bahawa, bercanggah dengan waranti dan representasi perayu, kewangan perayu adalah tidak kukuh dan mengalami kerugian yang banyak dan penggantungan ahli-ahli Lembaganya mengakibatkan responden membuat keputusan untuk membatalkan syarat tawaran tersebut. Mahkamah Tinggi berpihak kepada responden. Perayu telah merayu terhadap keputusan ke Mahkamah Rayuan.

Diputuskan, menolak rayuan dengan kos:

(1) Tiada kontrak dibuat antara perayu dan responden kerana transaksi antara mereka tidak terlaksana. Selagi dokumen-dokumen belum sah disempurnakan, surat-surat tawaran yang dikeluarkan oleh responden hanya penyataan kesanggupan di pihak responden untuk menawarkan kemudahan perbankan kepada perayu (lihat perenggan 17).

(2) Tawaran responden dibuat tertakluk kepada syarat-syarat yang dinyatakan dalam surat-surat tawaran tersebut. Adalah dalam fikiran kedua-dua pihak bahawa pelaksanaan perjanjian belian *Al-Istisna*' dan perjanjian jualan *Al-Istisna*' adalah terma tawaran tersebut dan bukan hanya suatu keformalan. Dua perjanjian tersebut hendaklah dilaksanakan untuk menyelesaikan transaksi kewangan. Tidak mungkin ini niat pihak-pihak agar prasyarat tersebut boleh tidak diendahkan (lihat perenggan 17).

(3) Selaras dengan keperluan-keperluan konsep *Al-Istisna*' surat tawaran responden memperuntukkan untuk belian projek tersebut oleh responden melalui perjanjian belian *Al-Istisna*' dan jualan oleh perayu nelalui perjanjian jualan *Al-Istisna*'. Kedua-dua perjanjian penting untuk menyelesaikan transaksi kewangan dan dinyatakan di bawah fasal 'Documentation' surat tawaran sebagai salah satu daripada dokumen jaminan yang perlu dilaksanakan (lihat perenggan 16).

(4) Penerimaan perayu terhadap surat tawaran responden tidak mutlak

sebagaimana menurut penerimaannya, perayu telah meminta jumlah-jumlah di bawah kemudahan tersebut diubah (lihat perenggan 14).]

Notes

For cases on whether contract had been concluded, see 3(3) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 4464–4465.

Cases referred to

Ayer Hitam Tin Dredging Malaysia Berhad v YC Chin Enterprises Sdn Bhd [1994] 2 MLJ 754; [1994] 3 CLJ 133, SC (refd)

Bank Bumiputra Malaysia Bhd Kuala Terengganu v Mae Perkayuan Sdn Bhd & Ors [1993] 2 MLJ 76; [1993] 2 CLJ 495, SC (refd)

Bank Islam Malaysia Bhd v Lim Kok Hoe & Anor and other appeals [2009] 6 MLJ 839; [2009] 6 CLJ 22, CA (refd)

Bekalan Sains P&C Sdn Bhd v Bank Bumiputra Malaysia [2011] 5 MLJ 1; [2011] 1 LNS 232, CA (refd)

Legislation referred to

Co-Operative Societies Act 1993

Appeal from: Civil Suit No K-22(A)01 of 2004 (High Court, Kota Kinabalu)

Peter KC Lee (Lee & Associates) for the appellant.
SH Leong (Angela Ubu & Associate) for the respondent.

Aziah Ali JCA:

[1] The appellant, the plaintiff in the court below, is an investment subsidiary company of Koperasi Pekerja-Pekerja Kerajaan Sabah Bhd, a co-operative registered under the Co-Operative Societies Act 1993. The appellant claims against the respondent bank losses it says it suffered as a result of the wrongful withdrawal of banking facilities by the respondent in breach of a purported agreement. The issue before the learned trial judge is whether there exists a legally binding agreement between the appellant and the respondent. It is the appellant's contention that there was a legally binding agreement between the parties upon the appellant's acceptance of the respondent's offer of banking facilities. The learned trial judge found that the intention of the parties is not to make a concluded bargain unless and until a formal contract is executed and dismissed the appellant's claim with costs. Having considered the submissions and the appeal records, we agreed with the learned judge and we dismissed the

appeal with costs.

THE APPELLANT'S CASE

[2] In August 2002 the appellant had entered into two sale and purchase agreements to purchase two lots of lands (NT 213072416 and NT 21307248) for the purpose of developing the said lands into a housing project in two phases ('the project'). Phase I was to comprise 400 units and Phase II 580 of mixed housing apartments.

[3] According to the appellant by a letter dated 11 August 2001 (pp 182–193 appeal record) the respondent offered banking facilities as follows:

> Facility I: RM9m bridging finance comprising RM3m to redeem the two lots of land from Borneo Housing Mortgage Finance Bhd and RM6m to part finance the development of the 400 units in Phase I; and
>
> Facility II: RM1.5m bank guarantee/performance guarantee in favour of the Ministry of Local Government and Housing being 5% of the development costs of RM29,759.010 under Phase 1.

[4] The appellant commenced preliminary works despite no formal written agreement having been executed. Subsequently at the request of the appellant, by letter dated 9 October 2001 the respondent amended the offer in respect of Facility I by substituting RM4m for redemption of the two lots and RM5m for part financing Phase 1. The respondent in its letter states that 'All other terms and conditions shall remain unchanged' (pp 194–205 of the appeal record).

[5] Whilst the security documents were being prepared the appellant vide letter dated 26 August 2002 requested the respondent to vary the development costs for Facility II from RM29,759.010 to RM28m. On 16 December 2002 the appellant inquired about the delay in the drawdown of the facility. The respondent informed the appellant that they were awaiting a third party opinion on the facilities in order to update the respondent's Financing Committee. On 6 May 2003 the appellant informed the respondent that the vendors of the two lands intended to rescind the sale and purchase agreements and to sell the lands to other parties and they requested the appellant to expedite the drawdown of the facility.

[6] By letter dated 21 August 2003 the respondent informed the appellant that the facilities offered had been withdrawn and cancelled (p 211 of the appeal record). The appellant alleged that the withdrawal of the facilities caused the failure to purchase the two lands and they were forced to abandon the project. The appellant alleged that the respondent had cancelled the offer

without valid reasons.

THE RESPONDENT'S CASE

[7] It is the respondent's case that the offer made was conditional upon compliance with conditions precedent and other terms and conditions and subject to a formal contract to be executed which is an express term of the offer stipulated in the letter of offer dated 11 August 2001. The respondent contends that parties were still in negotiation as proven by the appellant's request to revise the amounts of the facilities and correspondences between the respondent and the solicitors show that they were in the midst of drafting the relevant security documents. Therefore the letters of offer were merely an agreement to negotiate and not enforceable in law. It is further contended that there is no legally binding agreement between the parties until the execution of formal legal documentation as stipulated under cl 2 of the 'Conditions Precedent' in the letter of offer. It is not disputed that no legal documentation had been executed and the loan had not been disbursed.

[8] The respondent further says that during the application and negotiation of the facilities the appellant had submitted its audited financial account dated 31 December 2000 (pp 231–307 of the appeal record) to the respondent for consideration and had warranted and represented to the respondent that from the time of application for the facility to the time of drawdown, its cash flow and financial position shall remain good and sound. However some time in August or September 2002 it discovered from their solicitors that one of the properties was charged to Maybank. This information was not revealed by the appellant. The respondent says that the existence of the charge to Maybank and the amendment to the amount of end financing under Facility II requested by the appellant has implications on its two offers. Thus the respondent's Corporate and Financing Committee conducted a review on 27 November 2002 which then prepared a proposal and on 29 November 2002 submitted it to the respondent's Financial Committee for a decision whether to proceed further with the letter of offer or to revoke the offer made to the appellant. The respondent also discovered from newspaper reports that the appellant had accumulated massive losses and its Board had been suspended (pp 520–527 of the appeal record) which the respondent says had impaired the appellant's ability to comply with its obligations under the security documents. The respondent says that the appellant has breached its warranty and has misrepresented to the respondent with regard to its financial position which resulted in the respondent's Financial Committee's decision to revoke the two offers made to the appellant.

THE FINDING BY THE TRIAL JUDGE

[9] The learned judge found that the appellant's acceptance of the offer was

not absolute and unqualified based on the evidence that after the acceptance, the appellant had requested for variation of the development costs under Facility II. Thus the learned judge found that when the respondent cancelled the facility, parties were still in negotiation and there was no final agreement reached.

[10] The learned judge disagreed with the appellant's contention that the conditions precedent were merely for disbursement and not for approval. Having considered the terms of the letters of offer the learned judge found that it was a condition precedent that the legal documents must be executed as it was the expressed intention of the parties and it could not have been the intention of the parties to disregard the conditions precedent in the execution of the agreement. The learned judge also found that none of the documents referred to in cl 4 of the 'Conditions Precedent' in the letters of offer have been proved to have been provided to the respondent. Therefore the two letters of offer remained expressions of willingness on the part of the respondent to offer banking facilities to the appellant and a legally binding contract could only come into existence upon fulfillment of the conditions precedent.

THE APPEAL

[11] Before us counsel for the appellant submits that the learned judge had failed to apply the case of *Bank Bumiputra Malaysia Bhd Kuala Terengganu v Mae Perkayuan Sdn Bhd & Ors* [1993] 2 MLJ 76; [1993] 2 CLJ 495. Counsel submits that in *Mae Perkayuan* the Supreme Court held that an offer of a loan accepted by the borrower constituted a contract of loan. Having perused the factual situation in *Mae Perkayuan* we find that in *Mae Perkayuan* the facility that is the subject matter of the case is a conventional bank loan facility which is unlike the present appeal where the facility offered is the *Al-Istisna'* Islamic financing facility. In that case the terms and conditions in the facility letter ('exh P2') which constituted the contract of loan between the parties are not similar to the terms and conditions found in the letters of offer in the present appeal. Hence we are of the view that the learned judge has not erred in distinguishing *Mae Perkayuan*.

[12] In *Bekalan Sains P&C Sdn Bhd v Bank Bumiputra Malaysia* [2011] 5 MLJ 1; [2011] 1 LNS 232 this court vide the judgment of Abdul Malik Ishak JCA states, inter alia, as follows:

> In deciding whether the parties have reached an agreement, the law looks for an offer by one party and an acceptance to the terms and conditions of that offer by the other. There would be a bargaining process leading up ultimately to an agreement or meeting of the minds. This is the traditional method of analysis of an offer and an acceptance which has been applied by the courts in determining the formation

of the contracts. But for a contract to be formalised, all the terms and conditions must be fulfilled. The failure to fulfil a term or a condition would not give hse to a concluded contract

[13] An offer may be made unconditionally or upon conditions stated. In the case of an offer accompanied by terms and conditions, an acceptance to be valid must accord with the terms of the offer. In the present appeal the respondent's letter of offer dated 9 October 2001 was accompanied by terms and conditions and the full amended terms and conditions were attached to its letter as Appendix I (pp 197–205 of the appeal record).

[14] The letter of offer dated 9 October 2001 makes it clear that apart from amendment to the amounts under Facility I, 'All other terms and conditions shall remain unchanged'. The appellant accepted the offer on 26 October 2001. Subsequently by letter dated 26 August 2002 the appellant made another request to vary the amount under Facility II. On these facts we agree with the learned judge that the appellant's acceptance made on 26 October 2001 was not absolute.

[15] We note that the facility offered to the appellant is the *Al-Istisna'* Islamic financing facility. The *Al-Istisna'* Islamic financing facility in essence is similar to the *Bai Bithaman Ajil* ('BBA') Islamic financing facility. Under these facilities there is a purchase by the bank and a sale by the customer. In *Bank Islam Malaysia Bhd v Lim Kok Hoe & Anor and other appeals* [2009] 6 MLJ 839; [2009] 6 CLJ 22, Raus Sharif JCA (now PCA) explains as follows:

Basically, a BBA contract is a deferred payment sale contract. It is used to finance bank's customers to purchase and own properties or assets. It involves two distinct contracts, one a property purchase agreement and also a property sale agreement

… the property purchase agreement and the property sale agreement completed the BBA transaction.

[16] Consistent with the requirements of the *Al-Istisna'* concept, the respondent's letter of offer provides for the purchase of the project by the respondent vide the *Al-Istisna'* purchase agreement and the sale by the appellant vide the *Al-Istisna'* sale agreement (see p 197 appeal record). The *Al-Istisna'* purchase agreement and the *Al-Istisna'* sale agreement, being two agreements which are essential to complete the financing transaction between the appellant and the respondent, are specified under the 'Documentation' clause. For ease of reference we produce the said clause as follows:

Documentation:

(1) Al-Istisna' Purchase Agreement between the Bank and KHSB

(2) Al-Istisna' Sale Agreement between KHSB and the Bank

(3) Charge Documents for Istisna' Sale

(4) Undertaking for Istisna' Purchase

(5) Guarantee Documents Istisna' Sale

(6) Deed of Assignment and/or Irrevocable Undertaking Letter

(7) Memorandum of Deposit

(8) Any other legal documentation as advised by the Bank's legal adviser.

Clauses 2 of the 'Conditions Precedent' provides as follows:

> 2. Execution of all relevant legal documentation as stipulated under the 'Documentation' clause above.

These are 'principal terms and conditions' (p 182 of the appeal record) and remained so as stated clearly in the respondent's letter dated 9 October 2001 (p 194 of the appeal record).

[17] In the case of *Ayer Hitam Tin Dredging Malaysia Berhad v YC Chin Enterprises Sdn Bhd* [1994] 2 MLJ 754; [1994] 3 CLJ 133 cited by the learned judge the Supreme Court held, inter alia, as follows:

> It is a matter of construction whether the execution of the further contract is a condition or term of the bargain, in which case there is no enforceable contract as the law does not recognise a contract to enter into a contract, or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through, in which case there is a binding contract and reference to the more formal document may be ignored. In this respect, the court, in its task to ascertain the intention of the parties will, generally speaking, apply an objective test. In other words, it will ask itself what would the intention of reasonable men be if they were in the shoes of the parties of the alleged contract.

Having perused the terms of the letters of offer we find that the respondent's offer was made subject to the conditions stated. Considering that the facility offered was the *Al-Istisna*' financing facility, we find that it was within the contemplation of both parties that the execution of the *Al-Istisna*' purchase agreement and the *Al-Istisna*' sale agreement is a term of the bargain and not mere formality. These two agreements would have to be executed in order to complete the financing transaction. We agree with the learned judge that it could not have been the intention of parties that the conditions precedent

could be disregarded. In the circumstances we agree with the learned judge that until the legal documents are executed, the letters of offer issued by the respondent remained expressions of willingness on the part of the respondent to offer banking facilities to the appellant. We find there was no concluded contract between the appellant and the respondent since the transaction between the parties had not been completed.

[18] For the reasons stated above we dismissed the appeal with costs of RM15,000 to the respondent here and the court below and the deposit is to account of costs.

Appeal dismissed with costs.

Reported by Ashok Kumar